No. 2789

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTH AMERICAN OIL CONSOLIDATED, et al., *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

BRIEF AND ARGUMENT FOR APPELLEE.

E. J. JUSTICE,
FRANK HALL,
JAMES W. WITTEN,
Attorneys for Appellee.

No. 2789

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTH AMERICAN OIL CONSOLIDATED, et al., *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

BRIEF AND ARGUMENT FOR APPELLEE.

The issues presented by this appeal are practically identical with some of the issues presented by the appeals in the two cases each entitled Consolidated Mutual Oil Co. et al. vs. United States, Nos. 2787 and 2788, now pending before this Court; and in view of the facts that all three of these appeals are set for hearing on the same date, and that the decision of the Court in the cases last mentioned will be decisive of this appeal, the arguments presented in the briefs for appellee in cases Nos. 2787 and 2788 will not be repeated in this brief.

Statement of Case

The appellants, defendants below, were in possession of and claiming a right to all of Section 2, Township 32 South, Range 23 East, M. D. M., under certain pretended placer mining locations, and at the time this suit was brought had drilled a large number of wells thereon from which they had extracted, and were extracting and converting to their own use, large quantities of oil and gas.

The appellee, plaintiff below, claiming ownership and right of possession of said lands and all minerals therein, instituted and is now prosecuting these actions in equity in District Court of the United States for the Southern District of California for the purposes of removing the cloud cast upon its title by the claims of the appellants; to recover both the possession of the land and the value of the oil extracted therefrom; to enforce its general governmental policy with respect to the conservation, use and disposal of its public oil-bearing lands, and the oil therein; to prevent waste; for an accounting for and the recovery of the value of the oil taken and converted by the appellants; for *injunctions restraining appellants from further trespassing and removing oil, and for the appointment of a receiver* to take charge of the property involved.

This is an appeal from the order of the trial court appointing a receiver and restraining appellants from taking oil from the land pending final action

in this cause, and the only questions presented and argued in the brief filed on behalf of appellants are involved in their third and fourth assignments of error.

Effect of Withdrawal Order and Pickett Act

In their third assignment of error the appellants say that the trial court erred in appointing a receiver for the reason that the lands in question were not, under the terms of the withdrawal order of September 27, 1909, affected by that order, and by their fourth assignment of error it is contended that the Court erred in appointing a receiver for the reason that under the facts of this case the appellants were protected by the provisions of the Act of June 25, 1910, commonly known as the Pickett Act.

Statement of Facts

In support of its motion for the appointment of a receiver and the issuance of an injunction, the appellee offered in evidence its verified bill of complaint (Tr. p. 4), which is in all essential particulars the same as the bills of complaint in cases Nos. 2787 and 2788 above mentioned, and also practically the same as the bill of complaint sustained by this Court in the case of *El Dora Oil Co.* vs. *United States,* 229 Fed. 946.

The verified bill of complaint shows, among other things, that the appellee is the owner of and en-

titled to the possession of the lands in dispute; that the lands were on September 27, 1909, withdrawn by the President from all forms of occupation or appropriation under the mineral land laws of the United States; that the appellants long after September 27, 1909, went upon, and were at the time this suit was commenced, and for a long time prior thereto, trespassing upon and extracting and converting large quantities of oil and gas from said land to the great and irreparable injury thereof.

Affidavits (Tr. pp. 49-89) were offered in evidence by both the appellee and the appellants at the hearing under the motion for the appointment of a receiver from which it appears that each of the four quarters of the section of land involved in this action was embraced in a pretended placer mining location made prior to 1909; that no work was done by these defendants or any other person under and through whom they claim on either of the tracts prior to June 21, 1909, and no oil or other minerals were discovered thereon until long after March 1, 1911; that between June 21, 1909, and September 27, 1909, a standard drilling rig, including a derrick, and an engine house, and a belt house, and also a cabin or bunk house were erected on each of the quarter sections; that on June 21, 1906, two boilers for use in drilling wells were purchased and later placed near the center of the section in such a position that they could be used for drilling wells upon each of the four tracts. A well was drilled for water but no water was found.

The exact dates on which these improvements or any of them were made is not shown, but it is evident that they were completed long before September 27, 1909, because affiant Strassburger, who was manager of the Pioneer Midway Oil Company, by which the improvements were made, says in one of his affidavits in evidence (Tr. p. 61) that he "directed that a camp be established upon said section for the purpose of drilling wells upon each of the quarter sections thereof, shortly prior to the 21st day of June, 1909, and on said 21st day of June, 1909, received a report from the superindent of said property wherein the said superintendent stated: 'I will establish a camp down on Section 2 as soon as possible and will commence the erection of those boilers'."

This statement, when coupled with the statement of affiant Tryon (Tr. p. 56), an experienced derrick builder, that derricks such as those mentioned "can, under ordinary circumstances, be erected in about ten days' time", seems to warrant the conclusion that the improvements were completed soon after June 21, 1909; and the conclusion that they were completed some time prior to September 27, 1909, finds justification in the fact that defendants who furnish these affidavits in support of their claim have wholly failed to give the exact dates the improvements were completed, facts which could probably have been easily ascertained from the Pioneer Midway Oil Company, by whom the improvements were made.

The only attempt made to show that defendants' predecessors in interest were, either on or after September 27, 1909, the date of the withdrawal, in the diligent prosecution of work leading to discovery of oil or gas on any of the tracts involved is the statement quoted from the affidavit of affiant Strassburger (Tr. p. 63) as follows:

> "That employees of the said corporation were in actual physical possession of each of the four quarters of the said Section 2 and were actually living and laboring thereon on said 27th day of September, 1909; that on or about the said 27th day of September, 1909, the said employees were performing labor in clearing brush and leveling ground for the construction of the proposed drilling plants of the said corporation and that the said work of brushing out was done upon each of the said four quarters of said section respectively."

In view of the fact that the improvements mentioned above had all been completed before that date the necessity for the clearing away of brush is not very obvious.

It is not shown that any work of any kind was done on either of the tracts between September 27, 1909, and the spring of 1910, when the Pioneer Midway Oil Company transferred its claims to other persons who went into possession and, after doing the necessary preliminary work, drilled for oil on the several quarter sections as follows: On the Southeast quarter after April 15, 1910, to a depth of 460 feet; on the Southwest quarter from June 20, 1910, to July 17, 1910, to a depth of 665 feet; on

the Northwest quarter from July 25, 1910, to August 22, 1910, to a depth of 620 feet; and on the Northeast quarter from September 15, 1910, to September 22, 1910, to a depth of 586 feet. After the wells on these several quarter sections had been drilled to the depths above mentioned no further drilling was done until after March 1, 1911.

The appellants urge that a lack of available water prevented the drilling of wells any earlier than at the date given above.

It is submitted that under these facts the contentions of the appellant cannot be sustained and that for the reasons given in the brief filed in cases Nos. 2787 and 2788 the action of the trial court should be affirmed.

E. J. Justice

Frank Hall

Jas. W. Witten

Attorneys for Appellee.